1963

Loene Nelson v. Earl Le Roy Hutchings : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LOENE NELSON,
Plaintiff, Appellant and Respondent on Cross Appeal,

—vs.—

EARL LE ROY HUTCHINGS
Defendant, Respondent and Cross Appellant.

Case No. 9929

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT, SALT LAKE COUNTY. HONORABLE MERRILL C. FAUX, JUDGE.

LAWRENCE L. SUMMERHAYS
604 Boston Building
Salt Lake City, Utah
Attorney for Appellant and Cross Respondent

KIPP and CHARLIER and
D. GARY CHRISTIAN
516 Boston Building
Salt Lake City, Utah
Attorneys for Respondent and Cross Appellant

TABLE OF CONTENTS

AUTHORITIES — CASES CITED

TEXTS

IN THE SUPREME COURT OF THE STATE OF UTAH

LOENE NELSON,
Plaintiff, Appellant and Respondent on Cross Appeal,

—vs.—

EARL LE ROY HUTCHINGS
Defendant, Respondent and Cross Appellant.

Case No. 9929

APPELLANT'S BRIEF

STATEMENT OF NATURE OF CASE

Plaintiff seeks to recover damages for injuries sustained by her when she was walking south on Second East Street in Salt Lake City, Utah in a crosswalk with the red light in her favor and was struck by the defendant's car which was making a left turn to the west on Sixth South Street.

DISPOSITION IN LOWER COURT

The case was tried to a jury which granted judgment to the plaintiff for $3,550.00. The court granted defendant's motion for judgment notwithstanding verdict.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment granted by the court and reinstatement of the jury verdict.

STATEMENT OF FACTS

Plaintiff brought action against defendant to recover damages for injuries sustained in an auto-pedestrian accident that occurred at the intersection of Second East and Sixth South streets in Salt Lake City, Utah on June 28, 1962 at approximately 7:20 P.M. Sixth South Street is a four-lane blacktop level highway running east and west and Second East is a four-lane street running north and south, and is also level. Both streets are approximately 90 feet wide (R.85). There were painted crosswalks on all sides of the intersection. The east line of the crosswalk on the west side of the intersection was 14 feet 3 inches from the west side of Second East Street (R87). The crosswalk itself was seven feet five inches wide. The crosswalk south of the intersection is approximately the same distance from the south side of the intersection as the west crosswalk is from the west side of the intersection. Traffic at the intersection was controlled by a single semaphore signal located in the center of the intersection (R101) diplaying the usual red, green and yellow signals, in that order.

The plaintiff approached the intersection from the north and was walking south along the west side of Second East Street. When she arrived at the intersection the light was red for east-west traffic and not knowing how long it had been red she waited for it to turn green and then red again (R102, 129). When the light turned red the second time she looked to the east, to the north and to the west and saw no cars approaching (R102). She looked to the south

and saw a car facing north and observed it proceeding forward in a northerly direction, but no signal for a left turn was being given by the driver (R102, 165) and she assumed it would continue directly north (R102). She traveled at her normal walking gait within the crosswalk approximately 39 feet six inches from the north side of the street when she was struck by the defendant's vehicle (R87, Exh. 1 P). The impact occurred about 17 feet eleven inches west of the west side of Second East. As she walked across the street Mrs. Nelson looked mostly ahead but also looked to the west and glanced to the east (R130, 133) but didn't notice defendant's car again until just before the impact. She glanced down at her purse which she was carrying in her right hand, and which struck her leg just before the accident occurred (R102). As she glanced at the purse she heard the noise of a car and glanced to the east as the car struck her. She saw the car but it was too late to do anything (R103). She was struck by the right front of the defendant's car and knocked or carried and thrown approximately 22 feet from the point of impact (R88).

The road surface was dry, it was a clear day and visibilty was good except for the fact that the sun was low in the western sky and created a glary condition (R89).

The defendant stopped at the south side of the intersection. The light was red. When the light turned green he proceeded forward at a speed of five to ten miles per hour (R173). He traveled north until he was about to the center of the intersection, or to the semaphore signal, when he started to turn left (R174). As he turned to the left the sun struck him in the eyes (R174). The defendant knew that the sun would be low in the sky (R175). Although the sun

struck the defendant in the eyes he continued forward without application of brakes until his wife said, "Stop" just before the impact with Mrs. Nelson. The defendant did not see Mrs. Nelson at any time before the impact occurred (R175).

ARGUMENT

POINT I

THE COURT COMMITTED ERROR IN RULING THAT THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW AND GRANTING DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE JURY VERDICT.

In determining on appeal whether questions of negligence and contributory negligence were properly submitted to the jury, the reviewing court must review the evidence, together with every inference fairly arising therefrom, in the light most favorable to the prevailing party. *Coombs vs. Perry*, 2 Utah(2) 381, 275 P(2) 680. The plaintiff was the prevailing party under the jury verdict.

The court granted a judgment notwithstanding verdict (R68) to the defendant in this case on the basis of the decision handed down in *Mingus vs. Olsson*, 201 P(2) 495, Utah, 1949, 144 Ut. 505. The court in that case held the deceased Mingus was guilty of negligence as a matter of law in failing to look for traffic before crossing 13th East Street in an unmarked crosswalk, at its intersection with Westminster Avenue.

The testimony with respect to deceased's conduct as given by his wife was as follows:

> "As they stepped off the curb and started easterly across 13th East Street, decedent was to her left or north; that he looked neither to the left nor right, but looked straight ahead as they proceeded across the street; that he said nothing to her about approaching traffic."

The facts in our case are substantially different from those in the *Mingus vs. Olsson* case. In our case the plaintiff testified that she did look prior to crossing the street. She looked in all directions. The light was red in her favor. She saw the vehicle of the defendant at the south side of the intersection. No signal was being given for a left turn. She then continued into the crosswalk watching ahead of her and also looking to the west and glancing to the east. She looked down at her purse just prior to the impact when the purse struck her leg as she thought that the purse might have come open.

An independent witness testified he saw her look in each direction before starting across the intersection. (R83) This set of facts is different from that set forth in *Mingus vs. Olsson* and the rule as stated in *Mingus vs. Olsson* is not controlling in this case. There is no dispute about her having looked adequately before starting across the intersection. A different rule of law was applicable to the respective parties with respect to right-of-way. In the *Mingus vs. Olsson case* the deceased left a place of safety and stepped into a position of peril when the right-of-way was very doubtful. In our case the right-of-way of Mrs. Nelson is very clear as she had a red light in her favor.

In the case of *Coombs vs. Perry,* supra, the plaintiff and her friend were walking south on the east side of Washington Boulevard in Ogden between 26th and 27th Streets

in the evening about twilight. As they reached the mid-block crosswalk, plaintiff looked to the north and saw a bus 1½ blocks away. They decided to cross the street to see if it was her bus. Plaintiff walked west to the middle of the street and looked north. Seeing no vehicles between herself and the corner, she took a few steps westerly when she suddenly became aware of headlights to the north and was immediately struck by defendant's automobile. She saw defendant standing over her and said,

"Where on earth did you come from? I didn't see you." The plaintiff's friend watched plaintiff stop and look to the north. She said she also looked and didn't see any cars coming. The court said:

> "It is to be borne in mind that although the motorist and pedestrian are both required to exercise the same degree of care, that of the ordinary prudent person *under the circumtances*, that standard imposes upon the motorist a greater amount of caution than upon the pedestrian because of the potential danger to others in the operation of an automobile. Inasmuch as it is incontrovertible that plaintiff was struck in a marked crosswalk and defendant himself says he didn't see her at all it seems unquestionable that a jury question existed as to whether he kept a proper lookout for pedestrians at the crosswalk, or, even if it were to be assumed that he did so, whether he observed due care in affording plaintiff the right-of-way to which she was entitled."

The Court said:

> "The problem of importance was whether plaintiff was guilty of contributory negligence as a matter of law."

The test is:

> "Was the evidence so clear and compelling that all reasonable minds must say that it was established by a preponderance of the evidence that she was negligent and that such was a proximate cause of her injury?"

The Court said:

> "In contending that this question must be answered affirmatively defendant relies upon the proposition that the plaintiff must be deemed to have seen what was there to be seen." Citing a number of cases handed down by Utah and other courts in support thereof.

The Court further said:

> "Analysis of such authorities will reveal significant factual differences from the case at bar. Usually the pedestrian had just stepped from the curb into a traffic lane or out from behind a vehicle or other object obstructing the view into the path of an oncoming vehicle."

Typical of such cases is *Mingus vs. Olsson.* The court then reasoned that the defendant's vehicle may not have been on Washington Boulevard at the time the plaintiff and her companion looked. However, the court further stated that the affirmance of the judgment need not, however, rest upon the hypothesis that defendant was not on Washington Boulevard at the time plaintiff stopped and looked. Assuming that defendant was there and hence that plaintiff either saw or should have seen him, the trial court properly submitted the questions of her negligence and whether it proximately caused her injury to the jury.

"The salient point is that plaintiff as a pedestrian in a marked crosswalk had the right-of-way. The right-of-way simply means this: That if two persons are so proceeding that if they continued their course there would be a danger of collision, the disfavored one, defendant, must give away, and the favored one, plaintiff, may proceed; and the favored one may assume that this will be done. It is, of course, recognized that the right-of-way rule would not apply if when the favored one approached the crossing point the disfavored one was so close that in due care he could not or should not reasonably be expected to give way."

Further quoting:

"And the jury could reasonably find that in due care she might rely upon the assumption that he would so (slow down, turn to his right, or stop, if necessary, to afford the plaintiff the right-of-way and avoid striking her) until something occurred to warn her to the contrary. The evidence fails to disclose that any horn was sounded or that there was any other indication manifest which could have been observed by her to indicate that he was not going to afford her the right-of-way until it was too late to do anything to save herself from peril. *** Consideration must be given not only to the fact that she had the right-of-way upon which she could place some reliance, but also that a pedestrian crossing a busy street must be constantly vigilant for her safety with respect to all of the conditions around her. *Even if a car is seen approaching, unless it is so positioned as to constitute an immediate hazard to her, she is not necessarily obliged to focus full and undivided attention on that particular car and so calculate her entire conduct as to avoid beng struck by it.* She need not anticipate that the driver will speed, fail

to observe, or control his car, or fail to afford her the right-of-way or otherwise be negligent unless in due care she observes or should observe something to warn her of such improper conduct." (Bracketed material ours.) (Italics ours.)

Quoting again:

"In accord with such thought is the case of *Olsen vs. Peerless Laundry*, 111 Wash. 660, 191 P 756, wherein the court reiterated the rule that a pedestrian has the duty to look for approaching vehicles but said that after doing so whether ordinary care requires him to continue to look in the same direction or to look again, depends on other attendant circumstances, holding that the question of his contributory negligence was one of fact for the jury. Similarly, in *Jensen vs. Culbert*, where a woman was struck down at an intersection, the court said that there being nothing to show to the contrary, it must be assumed that she saw the car, but inasmuch as the law gave her the right-of-way and the car must have been more than 100 feet away when she started to cross, it could reasonably be found within her duty of due care to assume that the car would afford her the right-of-way, and concluded that it could not be said as a matter of law that she was guilty of contributory negligence. Another case on this pont is *Bolster vs. Cooper*, 188 Minn. 364, 247 NW 250. Plaintiff first saw defendant's car some two blocks away, saw it again when it was 200 feet away, but not again till it was right upon him. It was urged that his failure to continue to watch and avoid being struck by the car made him guilty of contributory negligence as a matter of law. But the court said that where he had the right-of-way for the reason as stated in the Jensen case just referred to the question of his contributory negligence was for the jury."

In the case of *Lowder vs. Holly*, Utah, 233 P(2) 350, in which the plaintiff Lowder failed to see the defendant's truck approaching the intersection, the court reasoned that when the plaintiff stopped at the intersecion the approaching truck was far enough away to have afforded plaintiff an opportunity to safely cross and that the plaintiff could have assumed and acted on the assumption that the driver of the defendant's truck would exercise ordinary reasonable care in his driving and it would be safe to cross the intersection.

> "Under such a state of facts Lowder's failure to see the truck could in no way have contributed to the accident."

Quoting further,

> "In other words, even if he had seen the approaching truck, it could have been found, consistent with due care for plaintiff to assume that he would be afforded his right-of-way because of entering the intersection first and proceed across. So the accident might well have happened just as it did, whether Lowder saw the defendant or not."

On the same point is the ruling in *Hess vs. Robinson*, 109 Utah 60, 163 P(2) 510, where the plaintiff failed to see an ambulance coming into the intersection from the west. The court said:

> "It was a jury question as to whether even if plaintiff had seen the ambulance the jury could have found it to be within his duty of care to think that the ambulance would obey the stop sign and that he was entitled to proceed until it became apparent to him that the ambulance was not going to do so, so that

> it was a question of fact whether even if he had seen it he would have realized it was not going to obey the stop sign in time to have avoided the accident. Consequently, the question of proximate cause; that is, whether the accident would have happened irrespective of his negligence in failing to see the ambulance was properly submitted to the jury. See *Poulson vs. Manness*, Utah 241 P(2) 152."

Certainly the facts in the Nelson case before this court are stronger in favor of the plaintiff Nelson than were the facts in the case of *Coombs vs. Perry*. The Hutchings vehicle was traveling at such a slow speed that Mrs. Nelson would have at any time up to the time of impact, if she had looked at the approaching vehicle, anticipated that the driver was watching her and that he would stop before running into her, and afford her her right-of-way.

In the case of *Edith M. Langlois vs. Norman T. Reese*, (the Honorable Merrill C. Faux, sitting with a jury), wherein the plaintiff was crossing State Street at a "T" intersection where there was no crosswalk this court, although holding the plaintiff guilty of negligence in crossing the street at other than at a marked crosswalk, nevertheless submitted the case to the jury on the question of proximate cause. In that case the plaintiff before crossing the street looked both ways on Sate Street and also looked up First Avenue before she started to cross, but she stated that the way was clear and she didn't see the vehicle. There was no question but what the case was properly submitted to the jury for its determination as to the question of proximate cause on the negligence of the plaintiff. 351 P(2) 638, 10 Ut. (2) 272.

In the case of *Fox vs. Taylor*, 10 Utah (2) 174, 350 P (2) 154, Miss Fox was crossing 5th South Street at a

point between 10th and 11th East. She was crossing from south to north and as she approached the street she looked to the west and saw no automobiles coming eastward on 5th South, but did see the defendant stopped at the 10th East intersection, about ¾ of a block away. Without making further observation, she proceeded to cross the street. Meanwhile, the defendant was coming easterly in the inside lane toward her at a speed of between 25 and 30 miles per hour, and when the plaintiff had nearly reached the center island which is in that street the defendant's car struck her throwing her to the ground and causing her injury. She was crossing at a point other than in a crosswalk, and in that case the question of plaintiff's contributory negligence was held to have been properly submitted to the jury.

In the case of *Charvoz vs. Cottrell,* 12 Utah(2) 25, 361 P(2) 516, the decedent was crossing 17th South Street on the west side of the intersection of 17th South and 19th East Street during the nighttime. The decedent was walking within a marked crosswalk. The defendant Cottrell was driving east on 17th South Street and struck the decedent as the decedent entered into the eastbound lane of traffic. The decedent made a statement to his mother at the hospital that he did not see the defendant's automobile approaching. The court in that case held that the question of plaintiff's contributory negligence and the defendant's negligence was properly submitted to the jury.

In the case of *Clarke vs. Tatum,* U. S. Court of Appeals, Virginia, 21 Automobile Cases (2) 657, plaintiff brought an action to recover for personal injuries sustained when he was struck by defendant's automobile while crossing in a crosswalk with the traffic light in his favor. The

defendant had stopped for the red light facing him and activated his left turn signal. When the light turned green for him and was red for the pedestrian, he started his left turn. The pedestrian never did see him. The pedestrian was struck on the left side when near the center of the street, but still in the crosswalk, by the right front fender of defendant's automobile. Plaintiff had no idea where defendant's car came from except that it came from his left. Defendant did not see plaintiff. Defendant conceded his negligence. The court said:

> "We cannot say that plaintiff who was crossing the street at a proper place, and who had the right-of-way over defendant's vehicle, was guilty of contributory negligence as a matter of law in failing to keep a constant lookout for approaching vehicles from his left. Such a question is almost always one for the trier of the facts, and this is not one of the exceptional cases where recovery should be denied as a matter of law."

The court further quotes:

> "Certainly under the factual situation here involved, reasonable minds might well differ as to whether the plaintiff exercised care for his own safety, or was guilty of contributory negligence which would bar his recovery."

Section 6628 of Blashfield Cyclopedia of Automobile Law and Practice, Volume 10B, at page 149, reads as follows:

> "It is an exceptional case in which a plaintiff's right of recovery should be denied as a matter of law, when he has been injured while walking upon a public thoroughfare, and it is the general rule that

> the issue of whether pedestrians or others on foot have been contributorily negligent is one for the jury."

In the case of *Chevalley vs. Degar,* Ohio, 52 NE (2) 544, which involved an accident at an intersection where there was a traffic light, the court stated:

> "A pedestrian, before stepping on a street at an intersection, must look in both directions for vehicular traffic, and whether a pedestrian should look again, in the exercise of ordinary care, is a question for the jury under proper instructions."

Our own approved jury instructions, set out in J.I.F.U. 20.3, 20.8 only places the obligation of reasonable care under the circumstances and is in accord with the general rule.

In the case of *Loutis vs. Bishop,* Oregon 1960, 21 Automobile Cases, (2) 355, plaintiff was crossing in a marked crosswalk. Before starting to cross she looked to the left and to the right. She saw the headlights of a car at least two blocks away; she thought that she had plenty of time. She was struck as she approached the opposite side of the street. The court said:

> "It is a question for the jury whether she was negligent and negligence was the proximate cause in her not looking again."

In the case of *Galatzer vs. Schwartz,* Illinois, 1960, 20 Automobile Cases (2) 891, plaintiff, a pedestrian, was injured when she was struck by a left turning car at a crosswalk on a bright afternoon. The trial court submitted the issues of defendant's negligence and plaintiff's contributory

negligence for not seeing the defendant's vehicle ahead of her which went out about to the center of the intersection and then turned left and into the plaintiff. Jury returned a verdict of $11,000 for plaintiff who appealed on the issue that the damages were inadequate and that the court should have directed a verdict for the plaintiff and not submitted the question of contributory negligence. The Supreme Court held the trial court should have directed the verdict and submitted only the issue of damages.

POINT II

THE COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANT'S REQUESTED INSTRUCTION NO. 4 THAT PLAINTIFF WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW AND THAT THE ONLY ISSUE FOR THE JURY TO DECIDE WAS WHETHER PLAINTIFF'S NEGLIGENCE WAS A PROXIMATE CAUSE OF HER INJURY.

Defendant has filed a cross appeal claiming error in the court's failing to give defendant's requested instruction No. 4.

The court did not err in not giving the defendant's requested instruction. Whether or not defendant was guilty of negligence was a jury question as also was the question of whether the negligence, if any, was a proximate cause of the accident. Plaintiff's argument contained in its main brief in support of plaintiff's appeal fully covers the plaintiff's position. The cases and authorities cited by plaintiff unanimously support the holding that the matter was properly submitted to the jury at the trial.

The jury had to consider the question of proximate cause before it could find a verdict in favor of the plaintiff. The jury has found, therefore, that the plaintiff's conduct was not a proximate cause of her own injuries. The defendant was not entitled to such an instruction but if it was entitled to it, the court's failure to give it was harmless error because the jury did find under proper instructions that plaintiff's conduct was not a proximate cause of the accident.

CONCLUSION

On the basis of the facts the plaintiff was not guilty of contributory negligence as a matter of law. The cases are unanimous in holding that a jury question exists where the plaintiff, pedestrian, has a red light in her favor and the trial court erred in granting defendant a judgment notwithstanding the jury verdict. The jury verdict should be reinstated.

Respectfully submitted,

LAWRENCE L. SUMMERHAYS
604 Boston Building
Salt Lake City, Utah
Attorney for Appellant and Cross Respondent